IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.133 OF 1977

The Maharashtra Small Scale Industries Development Corporation Ltd. ..Plaintiffs

Vs.

M/s.M.Surda Corporation and Ors. ..Defendants

Mr.Rajesh Shah a/w Mr.C.D.Patel i/b Sunkersett and Vaidya for the plaintiffs

Mr.Uday Bobde i/b Mehta Girdharlal for defendant no.1

Mr.Mehul Shah i/b Bharat Joshi for defendant nos.3a and b

CORAM : S.U.KAMDAR, J
DATED : 4TH APRIL, 2006

ORAL JUDGMENT:

1. The present suit is filed by the plaintiffs for the recovery of sum of Rs.1,01,750/- with further interest @ 12% p.a. on the principal amount of Rs.75,000/- @ from the date of the suit till judgment and further interest thereafter till payment at the discretion of the court. Some of the material facts of the present case are as

under:

2. The plaintiffs is a company which is wholly owned by the Government of Maharashtra and is interalia carrying on business in Bombay and supporting the Small Scale Industries. Defendant no.1 is a firm. Defendant nos.2, 3 and 4 are the partners of the said defendant no.1. Defendant no.3 expired on 14.9.89 and his legal heirs are brought on record. Sometime in or about December 1968 a collaboration agreement was entered into between the plaintiffs and the defendants and under the said agreement it was decided that both the plaintiffs and defendants will undertake a transaction of exporting the commodities to various foreign parties. It is the case of the plaintiffs that the original defendant has the knowledge, experience and know-how for procuring, processing, marketing and exporting the various commodities and accordingly both the parties entered into the aforesaid collaboration agreement. Sometime in or about December 1968, under the terms and conditions of the collaboration agreement it was provided that the plaintiffs will pay finance in respect of the

purchase of goods to various units and adjust the same alongwith interest on the sale proceeds being received from the foreign exporters.

3. Pursuant to the said contract of collaboration, various export contracts were procured by the defendants and were executed. In so far as the present suit is concerned, the same is a subject matter of one particular transaction i.e. a transaction which was entered into on 31.1.69 between the plaintiffs and one INTERANATIO PRODUCTEN B.V. of 100 Metric Tons of Indian H.P.S. Groundnut Kernels. The said contract was entered into by and between the plaintiffs and the said foreign purchaser on 31.1.69. Under the said contract, it was agreed that the plaintiffs will supply 100 Metric Tons of Indian H.P.S.Groundnut to the said foreign party and the defendants would make necessary arrangement for the supply and export of the said goods. In respect of the said contract, the correspondence was exchanged by and between the plaintiffs and the defendants and the plaintiffs made various advances to the processing units for procuring raw material as per the

direction of the defendants. It is the case of the plaintiffs that ultimately 49.950 Metric Tons of the goods were arranged for the purpose of supply by the defendants. It is the defendant who has identified the units for the supply of the said goods and the plaintiffs made payments to the said units for procuring the said 49.950 MT of the goods. According to the collaboration agreement and according to the export contract entered into between the foreign supplier the defendants effected delivery of the said goods to the foreign buyer. However, in respect of the balance material out of 100 MT i.e. for the raw material of 50.150 MT, the defendants did not procure the goods from the market nor made any arrangement for effecting the supply thereof to the foreign party. However, the said foreign purchaser raised a dispute with regard to the quality of the goods and also claimed damages for failure to supply the balance quantity out of 100 MT to the foreign supplier under the said contract dt.31.1.69.

4. The said contract dt.31.1.69 contained an arbitration clause for resolving the disputes

between the parties to the Arbitration.. Accordingly, on 31.1.69 foreign purchaser invoked arbitration and appointed J.W.Merchant as their Arbitrator and on behalf of the plaintiffs one Mr.H.M.Bostelman was appointed as an Arbitrator. Thereafter, arbitrators have made their award dt.17.10.69 and 3.11.69. The said two awards pertains to (i) for supply of inferior quality of goods and (ii) for non-supply of the material and thus committed breach of the said contract. In so far as inferior quality of supply is concerned, the Arbitrator after giving the allowance of 47 sterling pounds per mt on the delivery of inferior quality of the goods passed an award for 2347.65 sterling pounds together with 35 pounds as cost in respect of non supply of goods. The Arbitrator has awarded damages of 900 pounds together with cost of 33.65 pounds. Thereafter the said awards were filed in the High Court of Justice in England, Queens Bench Division and the said award has been made a rule of court and the leave was granted to enforce the same by order dt.4.7.73.

5. In pursuance of the said award, the said

foreign party commenced the recovery proceedings against the plaintiffs herein and issued notice u.s.434 of the Companies Act 1 of 1956 calling upon the plaintiffs to make payment failing which winding up proceedings were threatened by the plaintiff company. Thereafter recording of evidence took place between the plaintiffs and the defendants and under settlement arrived at by and between the parties, on 24.1.74 the plaintiffs paid Rs.70,000/- in full and final settlement of the claim. On 25.1.74 the plaintiffs paid further amount of Rs.5000 as there was certain error in respect of settlement recorded between the parties. Accordingly, the plaintiffs have made payment to the said foreign party of Rs.75,000/- towards the claim under the two arbitration awards passed against the plaintiffs in respect of the said contract dt.31.1.69. Subsequently, thereto, the plaintiffs demanded the said amount from the defendants herein and on failure of the defendants to pay so, the plaintiffs has filed the present suit for the recovery of said amount.

6. This suit has been defended by the

defendants by filing a written statement, originally which was filed by all the defendants and thereafter defendant nos.3(a) and 3(b) have filed a written statement as legal heirs of deceased defendant no.3. In the written statement which has been filed by the defendants, it has been interalia contended that the suit claim is barred by the law of limitation and / or that under Order 2 Rule 2 of the Civil Procedure Code the present suit is barred for non obtaining leave thereof. On merits, the collaboration agreement entered into in December 1968 has been admitted. However, it has been contended that it is the plaintiffs who failed to carry out obligation as contemplated under clause 8 and 10 of the said collaboration agreement and thus, committed breach thereof. It is therefore, contended that the defendants are not liable to make payment of any amount whatsoever. In so far as Order 2 Rule 2 of the Civil Procedure Code is concerned, it has been contended that a suit was filed being suit no.136 of 1972 which was referred to the Arbitration of Mr.J.I.Mehta Advocate who has dismissed both the claim and counter claim and thus the present suit is barred

by virtue of the provisions of Order 2 Rule 2 of the Civil Procedure Code. However, it is an admitted position that the said proceedings pertained to totally different transaction of various other different commodities though under the said collaboration agreement.

7. In para 4 of the written statement, there is a mention that the goods which are supplied by the plaintiffs to foreign party were supplied by the units introduced by the defendants but it is contended that it is the duty of the plaintiffs and not the defendants to see that the goods exported are of the contract description and quality. It has been further contended that it is the plaintiffs who has committed the breach and not the defendants herein. It has been contended that the goods were not of proper quality and the balance quantity of goods could not be supplied because the plaintiffs failed to obtain proper extension in respect of the delivery schedule for the purpose of effecting delivery of the said goods. It has been contended that the liability under the said export transaction is of plaintiffs and not of defendants.

It is further, contended that any loss suffered by the plaintiffs by virtue of breach of any terms and conditions of the said collaboration agreement should be borne by the plaintiffs alone and the same cannot be claimed from the defendants herein.

8. It has been contended by defendant nos.3(a) and 3(b) that the suit is pre-mature suit. It has been further submitted by defendant nos.3(a) and (b) that liability to pay the damages is of the plaintiffs and not of the defendants herein. On the aforesaid pleadings, the learned Judge has framed the issues by an order dt.27.7.00 which are as under:

> 1. Whether the plaintiffs prove that the agreement or contract for export of 100 tonnes of ground Nut kernels to Rotterdam International Producten in N.V. was the out come of the collaboration agreement Exhibit A executed between the plaintiffs and defendants?
>
> 2. Does the defendants prove that while entering into a transaction for export of 400 tones of ground nut kernels as per para 4 of the plaint the plaintiffs did not adhere to the terms and conditions of Exhibit A and that therefore the defendants are not liable for the transaction to the plaintiffs in any manner

whatsoever?

3. Whether the defendants prove that the goods supplied to international producten N.V. were in accordance with the contract with the buyer as alleged in para 4 of the written statement?

4. Whether the defendants prove that the buyers International Producten Rottendam had agreed to extend the shipment period for non-shipped quantity of the goods as alleged in para 4 of the written statement?

5. If answer to Issue No.5 is in the affirmative whether the defendants prove that the buyers International Producten were not entitled to anything in respect of non-shipment of balance goods as alleged in para 4 of the written statement?

6. (A) Whether the plaintiffs prove that award is bound upon the defendants?

(B) Whether the defendants prove that the award is not legal and valid and therefore, non bound upon them?

7. Whether the defendants prove that the plaintiffs defended the arbitration proceedings and the decree following therefrom without collaboration of defendants and in gross negligence as alleged in para 5 of the written statement?

8. Whether the defendants prove that the payments by plaintiffs to M/s.Malvi Ranchoddas and Co. was wrong and invalid as alleged in para 5 of the written statement?

9. Whether the defendants prove that the payment was made to international producten B.V. whereas the content was with International Producten N.V. as alleged in para 5 of the written statement?

10. Whether the defendants are liable to pay plaintiffs Rs.75000/- as claimed by the plaintiffs?

11. Whether the claim of the plaintiffs is barred by law of limitation as stated in para 11 of written statement?

12. Whether the suit is barred under Order 2 Rule 2 of the C.P.C. as alleged in para 12 of the written statement?

13. What order and decree?

9. Thereafter the evidence was recorded in the matter. Plaintiffs have tendered the compilation of documents which is marked at Ex.1 to E.85. Defendants have also tendered the documents which are marked at Ex.D1 to D.21. The documents which are produced by the parties are the collaboration agreement of December 1968, the contract dt. 31.1.69 and the correspondence which has been taken place between the parties including the correspondence with the brokers and the units who are the supplier of the material under the said contract. Both the plaintiffs and defendants have laid the oral evidence and has examined one witness each. Though oral evidence is not much relevant in the case and the case turns on most of the

documentary evidence, but in a nutshell the case of the parties before the court is in respect of breach committed by the plaintiffs or the defendants of the said collaboration agreement of December 1968. Relevant oral and documentary evidence are analysed while dealing with each of the said issues.

10. In so far as issue no.1 is concerned, there is no dispute that the contract dt.31.1.69 between the plaintiffs and Internation-Production N.V. was entered into under the collaboration agreement executed by and between the plaintiffs and defendants in December 1968. In view of the fact that on this issue there is no dispute between the parties, the said issue does not require to be analysed further and I answer the same in affirmative.

11. In so far as issue no.2 is concerned, there are serious disputes between the parties. It is the case of the defendants that the plaintiffs have committed breach of the collaboration agreement entered into between the parties in December 1968

by virtue of its conduct which is not a business like manner and thus the loss suffered by the plaintiffs is an outcome of plaintiffs' own breaches and therefore the defendants are not liable.

12. In so far as issue no.2 is concerned, the learned counsel appearing for the defendants submitted that there are defaults on the part of the defendants of various breaches. He has drawn my attention to clause 10 of the collaboration agreement. The said clause 10 of the collaboration agreement reads as under:

> "10. Notwithstanding anything contained in these presents or elsewhere it is agreed by and between the parties that all export shall be made in the name of the Corporation. The only duty and function of the Corporation under the arrangement contemplated under these presents shall be that of making the advance to the Units on the terms referred to above and promptly in a business like manner attending to correspondence enquiries etc. it being agreed that all other duties, functions and obligations in connection with the procurement, proceeding of raw materials for export of the scheduled commodities shall be discharged and performed by the said firm at its own expense and costs in all respects. The cost and expenses

> incurred by the said firm have been agreed to be taken into account for determining the price at which the scheduled commodities are to be exported on the basis of actually supported vouchers or other evidences."

13. It is the case of the defendants that by virtue of aforesaid clause wherein it is interalia provided that the plaintiff corporation is required to act promptly in a business like manner in attending to correspondence and enquiry, however, the plaintiffs have failed to act accordingly and thus the loss has been suffered by them. It has been contended by the learned counsel for the defendants that the plaintiffs have not acted in business like manner under the collaboration agreement on three grounds.

14. Firstly, it has been contended that the action on the part of the plaintiffs in making delay in payment to the various units for the supply of goods has resulted in delay in delivery of the goods and thus, the plaintiffs have committed breach of clause 10 of the terms and conditions of the collaboration agreement.

15. Secondly, it has been submitted that even in entering into the correspondence for the purpose of grant of extension of time for delivery schedule also, the plaintiffs have not been prompt and quick in obtaining the extension from the foreign supplier for effecting delivery of the goods and thus, the plaintiffs have committed breach of the said clause 10 of the collaboration agreement and therefore, defendant is not liable for any claim or damages.

16. Thirdly, the ground set up by the defendants that there is a breach by the plaintiffs of the terms and conditions of the collaboration agreement by not defending the arbitration proceedings initiated by the foreign party. Furthermore, by making payment under the award, the plaintiffs have committed breach of the terms and conditions of the said collaboration agreement.

17. The next defence advanced by the learned counsel for the defendants is that while making payment under the award they have not obtained

permission from Reserve Bank of India and therefore, payment is illegal and thus, also defendants are not liable to make payment of the said amount. It has also been contended that the plaintiffs have also committed breach of the collaboration agreement by making payment to the company which is different then the company with whom the suit transaction is entered into.

18. On the aforesaid grounds it has been contended that there is a breach committed by the plaintiffs of the said contract and thus, the plaintiffs are not entitled to any claim of the said damages from the defendants. Now I shall continue each of the aforesaid grounds on the basis of evidence on record both oral and documentary. The learned counsel for the defendants has contended that there has been a delay in making payment by the plaintiffs to the units identified for the supply of the said commodities. In support of the said contention, it has been brought to my notice that letter dt.7.4.69 addressed by the units indicate that the goods were ready for delivery and request was made for making payment. The said

letter was addressed to the plaintiffs by one Badheka Brothers. By letter dt.8.4.69, the plaintiffs were asked by the defendants to make payment to the Badheka Brothers in respect of the purchase of goods of 7500 kilos of groundnut kernels for an amount of Rs.15,500. On 12.4.69 the plaintiffs forwarded a cheque of Rs.15500 in favour of Badheka Brothers in respect of the said claim. It is the case of the plaintiffs that similarly in case of another supplier Jamnadas Bhimji and Co. a letter was addressed on 24.4.69 seeking payment of Rs.34750 for the supply of groundnut kernels and the payment was made by the plaintiffs by letter dt.26.4.69 being Ex.13 and 14 on record. The learned counsel for the defendants has contended that the payment after 2 days of request in case of Jamnadas Bhimji and Co. and 4 days in case of Badheka Brothers amounts to delay in making payment and consequently amounts to the plaintiffs not acting in a business like manner and thus the plaintiffs have committed breach of the said contract.

19. On the other hand, the learned counsel for

the plaintiffs has contended that there is no delay in making payment to any of the supplier. He has contended that payment within 2 days of the request and 4 days of the request cannot be termed as not acting in a business like manner as contended by the defendants. It has been further contended that it cannot be expected that the plaintiffs which is a government concern should keep the money in hand and to make the cash payment as soon as request is made by any organisation or any person. Even if it is a private organisation, the time to release the payment would be obviously for atleast 2/4 days and that cannot be termed as breach of the terms and conditions of clause 10 of the said agreement. In support of the aforesaid contention, the learned counsel for the plaintiffs has further pointed out that in an evidence which has been recorded by the defendants witness, defendants also have admitted that there is no such delay in making payment and the said relevant portion of the cross examination is as under:

> "I do not recollect what was the share of defendant no.2 in the joint venture with regard to the suit transaction. Defendant

no.2 was entitled to some share in the profit of the suit transaction. The defendant no.2 was also liable to the extent of his share in losses of the joint venture. My attention is drawn to paragraph 8 of my affidavit of evidence.

Q. What do you mean by plaintiff failed to carry out the agreement in general as mentioned in para no.8?

A: That means the plaintiffs failed to make payment of supplies of services as well as to the respective units.

I had written several letters to the plaintiffs about they had not making payment to the suppliers. I have not produced those letters in this Suit. I had furnished to the plaintiffs the list showing the names and addresses of the units and their bankers who will undertake the work of processing of the scheduled commodities within one week of the signing of the suit agreement. The plaintiffs responded to the list, partially. The plaintiffs did not respond thereupon within time frame by giving the approval. The defendant no.1 firm did write to the plaintiff about it. I have not produced those letters in this suit. My attention is drawn to the Exhibit Nos.4 and 5, 7,8,9 and 10, 13 and 12 and 14. It is correct that as per these letters the Plaintiffs had made payments promptly. My attention is drawn to letter dated 7.4.6, Exhibit 4. The Badheka Brothers had not made any complaint to us about not having received the payments as mentioned in Ex.4. My attention is drawn to the letter 12.4.69, Exhibit 7. Badheka Brothers had not complained to us about the plaintiffs having not made payments to them as mentioned in Ex.7. From the compilations filed by myself and the plaintiffs in this

> suit, I cannot point out a single letter whereby the defendant no.1 or any of the Units had made complaint about the plaintiff having not made the payments. My attention is drawn to cl.10 of the suit agreement. It is correct that the only duty or the function of the corporation is to make advances to the units and promptly in a business like manner attend to the correspondence, enquiries etc. I have never complained to the plaintiffs about they having not complied with his condition. It is not correct to say that my allegation in para no.8 of my affidavit of evidence about plaintiffs having not carried out the agreement in general or in particular with regard to clause 8 and 10 of the agreement is false."

20. The learned counsel for the plaintiffs has thus, contended that there is no breach of clause 10 as contended by the learned counsel for the defendants. In so far as breach of the agreement alleged on the ground of payment is concerned, I have considered the rival submissions on this aspect and in my view, it is not possible to hold the plaintiffs guilty of breach of clause 10 of the terms and conditions of the collaboration agreement. I am of the view that there is no delay whatsoever in making payment by the plaintiffs to third party i.e. units identified by the defendants for supply of the said goods. The

request for payment has been made within 2 days in case of Jamnadas Bhimji and Co. and within 4 days in case of Badheka Brothers. When payment is made within such a short duration of request made then it cannot be termed as delay in making payment amounting to breach of the said contract. Furthermore, clause 10 or any clauses of the agreement does not prescribe any time limit within which the amount to be paid at the request made by the defendants to the said units who are supplier of the said material. In my opinion thus, in absence of any time limit prescribed for making payment under the agreement, the court must consider a reasonable time limit within which the payment should be made by the plaintiffs to such suppliers in discharge of their obligation under the terms and conditions of the contract. When considering reasonable time limit, I am of the opinion that the payment within 2/4 days cannot be treated as unreasonable time limit and thus it is not possible to hold that plaintiffs are not acting in business like manner by virtue of making payment within 2/4 days of the request made by the defendants to release the payment. In that light

of the matter the aforesaid contention of the defendants is liable to be rejected.

21. The next aspect of the breach which has been agitated by the learned counsel for the defendants is not entering into appropriate and timely correspondence with the foreign buyer for the purpose of extension of delivery for supply of balance quantity of the said goods. In so far as this aspect of the breach is concerned, both the parties have relied upon only documentary evidence in support thereof. Under the contract dt.31.1.69 executed by and between the plaintiffs and defendants, the shipment period is provided as March 1969. The documentary evidence in respect of extension of time of delivery of goods is commencing from a letter dt.7.5.69 which is Ex.19. This letter has been issued by the plaintiffs to the broker of the foreign supplier. This letter interalia states that the plaintiffs have already supplied 49.950MT of groundnut Kernels and requested extension of time for the balance 50 tons to be shipped during March 1969. In reply thereto, is a letter from the foreign broker dt.9.5.69 which

is Ex.20. By the said letter, the broker has the name of the steamer by which the plaintiffs intend to ship the goods so as to enable them to grant extension. By another letter dt.14.5.69 by the said broker, the plaintiffs are informed that the foreign buyer has granted extension for shipment of goods per s.s.Panama or s.s.Eilenburg upto May, 1969. It has been further mentioned in the said letter that the said extension is subject to the guarantee by the plaintiffs that the goods which will be supplied will be of excellent quality. This letter dt.14.5.69 was forwarded to the defendants by plaintiffs on the very same day and correspondence in that behalf are at Ex.23 and 24. In reply thereof i.e. after almost 14 days on 28.5.69 the defendants have addressed a letter to the plaintiffs requesting the plaintiffs to address a letter to the foreign broker stating therein that though time is extended but it is not possible to ship the goods by the steamer named by them and they are required to make alternate arrangement for the balance supply of the quantity from Jamnagar port. It has been further stated by the defendants that the plaintiffs should write to the foreign

buyer that on having made appropriate arrangement they will revert back further on the subject. Thereafter on 28.5.69, the plaintiffs addressed a letter in accordance with the request of the defendants to the foreign buyer which is Ex.26 to the said plaint. On 29.5.69 the foreign buyer immediately addressed a letter stating therein that foreign buyer wants to know whether the plaintiffs is shipping the balance quantity on or before the extended delivery period or not. The said letter which was received by the plaintiffs was forwarded to the defendants on the very same day on 29.5.69 by letter of the even date which is Ex.28 in the proceedings. On 31.5.69 the plaintiffs received another letter from the foreign buyer intimating that the inspite of the fact that the time was extended for delivery of the goods and the two ships have now sailed from Bombay but no goods are despatched thereon. The said broker also asked the plaintiffs to let them know that by which steamer the plaintiffs intend to ship the goods from Jamnagar as per their earlier letter. This letter of 31.5.69 was forwarded to the defendants by letter dt.3.6.69 Ex.30. On 6.6.69 the plaintiffs

received another letter from the foreign buyer interalia stating that there has been a default in supply of balance 50 MT of goods and therefore the foreign purchaser is proceeding for arbitration for breach of the contract. The said letter dt.6.6.69 was also forwarded to the defendants by the plaintiffs on 7.6.69. Both these letters are Ex.32 and 33 of the record. By letter dt.9.6.69 said telex message has been confirmed by the foreign buyer and the foreign buyer has contended that they do not agree to further extension and secondly, there is a default on the part of the plaintiffs to supply the material and they are invoking arbitration proceedings.

22. From the aforesaid correspondence, it is clear that there has been a default in supply of 50 mt of the balance quantity. On the basis of aforesaid contention, the learned counsel for the defendants has contended that the plaintiffs have not acted in business like manner by not writing letter immediately on the very same day and thus, there was no extension of time for delivery of goods and therefore, the plaintiffs have committed

breach of clause 10 of the collaboration agreement. On the other hand, the learned counsel for the plaintiffs has contended that each and every letters are promptly replied and promptly forwarded to the defendants. It is the job of the defendants to make arrangements for the supply of the goods by identifying the ship and identifying the units under the collaboration agreement. It is the defendants who have committed breach by not effecting the delivery of the goods in time though extension was obtained upto May 1969 as per their request. It is further the case of the plaintiffs that it is the defendants who has committed delay in correspondence and not plaintiffs and the plaintiffs have been vigilant in forwarding the letters from time to time without any delay whatsoever. In the light of the documents produced on record, it is the contention of the plaintiffs that it is the defendants who have committed breach by not effecting delivery of the goods as per the obligation cast on him under collaboration agreement and thus, the defendants are liable for claim for damages.

23. I have considered the evidence and material produced before me. I am of the opinion that in so far as default in delivery of the gods is concerned, there is no much dispute and it is an admitted position that there is a failure to effect delivery of the balance quantity of 50 MT. The question is whether the default is on the part of the plaintiffs or on the part of defendants. Under clause 10 of the said collaboration agreement, it is the liability of the defendants to effect the delivery of the goods by identifying the units and by making necessary arrangement by shipment of the goods. However, the learned counsel for the defendants has contended that though it was the obligation of the defendants to effect delivery of the goods but it was also the obligation of the plaintiffs to enter into correspondence in business like manner and obtain the extension of time as requested. It is the case of the defendants that the plaintiffs have not acted in business like manner by promptly entering into correspondence and thus, they have committed breach of cl.10 of the agreement and therefore plaintiffs are liable for damages and not the defendants.

24. Looking at the material which has been produced before me, it is necessary to see whether the correspondence entered into by the plaintiffs is prompt and reasonable or not. The first request for extension of time was made by the plaintiffs on 7.5.69 at the request of the defendant. On 9.5.69 there is a reply seeking to know which are the steamers by which the goods will be supplied. Pursuant to letter dt.9.5.69 enquiries were made to the defendants to know the name of the ship. After the name of the ship was communicated, there was a letter dt.14.5.69 Ex.22 by which the foreign broker has accepted the two ships named s.s.Panama and s.s.Eilenburg for effecting delivery of the goods and time to deliver is extended till May 1969. The said letter of 14.5.69 has been forwarded to the defendants by the plaintiffs on the very same day i.e. by letter dt.14.5.69 E.24 on record. However, it is only after 14 days i.e.28.5.69 and just 3 days before the extended period of delivery was to expire, the defendants have addressed a letter seeking further extension on the ground that it was not convenient to supply the goods on the

two ships named. This letter of 28.5.69 was forwarded by the plaintiffs by addressing a letter on the next day 29.5.69 to the foreign party by reproducing the very same wordings as defendants wanted and sought to supply the goods from Jamnagar and an assurance was given that they are making alternate arrangement. On 29.5.69 itself another letter is addressed by the foreign broker to the plaintiffs seeking details how the said goods are going to be shipped. The said letter is also forwarded to the defendants on the very same day by the plaintiffs on 29.5.69 by letter dt. Ex.28 on the record. On 31.5.69 the foreign party informs that Eilenburg actually sailed from Bombay and there was sufficient time for the plaintiffs to supply the goods still the plaintiffs did not supply the goods and they sought to know which is the steamer by which the goods are going to be shipped from Jamnagar. This letter of 31.5.69 is also forwarded by the plaintiffs to the defendants on 3.6.69 which is Ex.30 on the record. However, there was a total silence on the part of the defendants. In the aforesaid circumstances, on 6.6.69 the foreign broker on behalf of their buyer

threatened the arbitration proceedings for non-supply of the material and even this letter was forwarded to the defendants on 7.6.69 by letter which is Ex.33. It is only on 11.6.69 the plaintiffs in place of giving any name of the ship from which the goods were proposed to deliver from Jamnagar has now turned to the contention that how the proceedings for arbitration should be dealt with. Thus, in my opinion, the correspondence makes it very clear that the plaintiffs has acted promptly and immediately in entering into the correspondence both with the foreign buyer and defendants. It is the defendants who have committed default by not naming the ship from Jamnagar and forwarding the goods for delivery though the delivery period was extended right upto May 1969. The defendants did not ask for further extension nor any time nominated the ship by which the goods were going to be exported.

25. In that light of the matter, I am of the opinion that the contention of the defendants that plaintiffs have committed breach by not acting in business like manner in entering into the

correspondence is without any substance and is liable to be rejected. I therefore, hold that it is the defendants who are in breach of the terms and conditions of clause 10 of the contract by not arranging delivery of the goods within the extended delivery period.

26. Thereafter, the learned counsel for the defendants has contended that in so far as the dispute as to the quality of goods is concerned in respect of the goods which are already supplied, it is the case of the defendants that the defendants cannot be held liable for the inferior quality of goods because the defendants had obtained and given a certificate of appropriate quality. In support of the aforesaid, he has relied upon a letter 5.6.69. The said letter states that the certificates are enclosed therewith. However, firstly in the course of the present proceedings though the said letter has been produced, no certificates are produced by the defendants to establish that the goods supplied by him were as per the required quality. In absence of production of certificates, it is not possible to hold that

defendants have supplied the said goods of required quality as per the contract and therefore also I hold that the defendants have failed to prove that they have supplied the goods as per the quality ordered by the foreign supplier. It is because under clause 10 of the contract, it is the liability of the defendants to arrange the delivery of the goods as to the quality required in accordance with the contract and not that of the plaintiffs. In the light of the aforesaid contention even in respect of the claim of quality of goods I hold defendants liable and not the plaintiffs herein.

27. Now that takes me to the next contention of the defendants that the plaintiffs have not participated in the arbitration proceeding and thus the plaintiffs are liable for the said loss and consequent award passed. It has been contended by the learned counsel for the defendants that it was the responsibility of the plaintiffs to defend the arbitration proceeding in business like manner which the plaintiffs have failed to do and thus the defendants cannot be held liable for the same and

only plaintiffs are liable. In support of the aforesaid contention, the learned counsel for the defendants have relied upon the documentary evidence and correspondence in that behalf particularly the letter dt.11.6.69 which is Ex.37. He has relied upon a portion of the said letter which is as follows:

> "In response to your letter dt.9.6.69 our Shri Madanlal called on you on 9th June in the afternoon but your Jt.Development Officer and Purchase Manager were no available. Today, when Shri Madanlal called on you and saw your Jt.Development Officer, he suggested to me Mr.Alwe and the purchase manager. Again except Mr.Alwe none were available for immediate consideration of this serious matter. We have therefore, done our best to avoid the delay in responding to the communication and we are now only waiting to hear from you advices and the suitable steps taken by you. PLEASE NOTE NO REFERENCE SHOULD BE MADE OF ANY SPECIFIC CONTRACT RECEIVED BY YOU PERTAINING TO THESE GOODS IN ANY OF YOUR COMMUNICATION. We have already apprised your Shri Alwe clause by clause with the terms and conditions of Incorporated Oil Seed Association Contract No.75, specimen copy of which was made available to him for ready reference. According to the arbitration clause within 7 days i.e. by 13th June 1969 the name of your Arbitrator should be conveyed in writing so as to reach not later than 13th June before 5 P.M. to buyers.

28. By relying on the aforesaid, he has contended that the defendants asked the plaintiffs to nominate the arbitrator but the plaintiffs failed to nominate the arbitrator and thus, he has contended that the plaintiffs did not act in a business like manner by not defending the said arbitration proceedings. In so far as this argument is concerned, the learned counsel for the plaintiffs has brought to my notice the entire correspondence pertaining to arbitration proceeding commencing from E.35. Ex.35 is a letter from the foreign supplier by which the arbitration proceedings were invoked. Immediately on 10.6.69 the said letter of the foreign supplier dt.9.6.69 has been forwarded to the defendants calling up on the defendants to immediately give the name of the arbitrator and what reply should be given. By letter dt.11.6.69 the defendants mentioned that the plaintiffs should not submit to the arbitrator and stated that on merits reply should be given. Accordingly, a reply has been sent by the plaintiffs on 12.6.69. The said letter dt.12.6.69 is on identical terms as desired by the defendants. Thereafter on 16.6.69, the plaintiff pointed out

that they did not have copy of contract no.75 of Incorporated Oil Seed Association which is referred by the defendants in their letter and therefore sought to supply the said contract. The plaintiffs also requested that the necessary appointment of Arbitrator should be effected since the arbitration is a serious matter. By letter dt.19.6.69 received from the foreign broker, the plaintiffs were told that they are entitled to invoke the arbitration contract in terms of clause 75 of Incorporated Oil Seed Association. This letter has been forwarded by the plaintiffs to the defendants on 19.6.69 which is Ex.42. Thereafter, there was another letter from the foreign buyer dt.24.6.69 once again threatening to proceed with the Arbitration Proceeding. After all these correspondence and in consultation with the defendants the plaintiffs addressed a letter dt.23.7.69 interalia stating there as under:

> "We therefore hereby declare that the arbitration asked for and arbitrators nominated by you as well as suggested to be nominated on our behalf are not acceptable to us and the award granted by such arbitrators will not be binding upon our Corporation. It is further hereby notified

> to you that if this arbitration is held, as proposed by you, which according to us is at a unmatured period, its conclusion will not be based on factual premises and as such will be treated as null and void."

29. Thus, in so far as arbitration proceeding are concerned, a decision was taken by the plaintiffs in consultation of the defendants and as per the advice and guidance of the defendants not to participate in the arbitration proceeding and to contend that the said arbitration proceeding are not binding on the plaintiffs. In view of the advice and request made by the defendants, the plaintiffs have accepted the said contention and accordingly, communicated to the foreign buyer. The consequence was that the exparte award has been passed against the plaintiffs for the aforesaid amount.

30. In the light of the correspondence which has been brought on record it is not possible to accept the contention of the learned counsel for the defendants that plaintiffs have failed to defend the arbitration proceeding. On the contrary, the defendants never wanted the

plaintiffs to participate in the arbitration proceeding and therefore the said contention raised is required to be rejected. On the basis of the evidence produced, I am of the view that the plaintiffs did not participate in arbitration proceedings at the instance of the defendants themselves and therefore, it is not open for the defendants to raise any such defence.

31. The next contention advanced by the learned counsel for the defendants is that the payment made by the plaintiffs is contrary to the foreign exchange regulations because permission is not obtained from Reserve Bank of India. In my opinion, neither there is any material nor there is any pleading or evidence has been laid by the parties in that behalf and that issue cannot be allowed to be raised in the present proceeding.

32. The next contention advanced by the learned counsel for the defendants is that payment is made to unauthorised party. In support of aforesaid contention the learned counsel for the defendants has contended that contract is entered into

Internatio Producten N.V. whereas payment is made to in Internatio Producten B.V. and thus payment is made to the wrong entity and therefore the plaintiffs are not entitled to recover the said money from the defendants.

33. In respect of the aforesaid contention, my attention has been drawn by the learned counsel for the defendants to the contract which is in favour of Internatio Producten N.V. even the award is in favour of entity ending with N.V. However, decree is passed in the name of Internatio Producten B.V. The said decree is at pg.100 Ex.80 of the compilation whereas the award is at Ex.64 pg 84 of the record. Now in respect of the aforesaid contention, there is a letter from the solicitors of the party at Ex.81 and Ex. 82 in which the solicitors of the said foreign purchasers stated that the decree is passed in favour of Internatio Producten B.V. by the High Court of Justice, Queens Bench Division and by letter dt.24.1.74 E.82 the plaintiffs have made it clear that payments are made because the advocates and solicitors of the company has confirmed that Internatio Producten

N.V. and Internatio Producten B.V. are one and the same entities and not two different entities. In the light of the said document and evidence on record, the learned counsel for the defendants contends that the payments are made to the wrong entity and thus defendants are not liable to effect payment thereof to the plaintiffs, is not sustainable and is required to be rejected. I am of the opinion that the correspondence on record sufficiently indicates that in fact there is only a typographical error in the name of the company i.e. words indicated as 'N.V.'. The advocates of the foreign party has produced the decree which is passed in favour of the same company but with correct suffix 'B.V.' In the light of the aforesaid, it is not possible to accept the contention of the defendants counsel that payment is made to the wrong entity by the plaintiffs.

34. On the aforesaid evidence and material on record, I am of the opinion that it is clear that it is the defendants who have committed breaches of the contract by effecting delivery of inferior quality of goods and also by virtue of non-delivery

of balance 50 mt. I am also equally of the opinion that there is no breach on the part of plaintiffs in not acting in business like manner as it is supposed to have been under the provision of cl.10 of the agreement. I am also of the opinion that the plaintiffs have acted bonafide in not defending arbitration proceeding and had acted on the advice of defendants themselves and therefore it is not open for the defendants to contend that the defendants are not liable because of the failure on the part of the plaintiffs to participate in arbitration proceeding. In that light of the matter, I answer issue no.2 in negative.

35. I answer issue no.3 also in negative. I answer issue no.4 and 5 in affirmative holding that buyers did extend the time for delivery of the goods upto May 1969 and I also further held that even in extended period, the defendants have failed to effect delivery of the said goods.

36. In so far as issue no.6 (a) and (b) are concerned, on the material discussed above it is clear that under clause 6 and 10 of the contract it

is the defendants who are liable to all the obligation of effecting delivery of the goods. If the defendants has committed breach of the said obligation then obviously the loss must be born and suffered by the defendants and not by the plaintiffs. In that light of the matter, I am of the opinion that evidence and material discussed above indicate that the defendants are bound by the award passed against the plaintiffs and I answer the issue 6(a) in affirmative. In so far as issue no.6(b) is concerned, I answer issue the Issue 6(b) in negative.

37. In so far as issue no.7 is concerned, I answer the same in negative and I also hold that the plaintiffs were justified in not participating in arbitration proceeding because that is the advise tendered by the defendants and the plaintiffs have acted bonafide in accordance with the advice given by the defendants themselves. It is the defendants who were supposed to assist the plaintiffs in conducting Arbitration Proceeding under the terms of Collaboration Agreement and that defendants having directed the plaintiffs not to

participate in Arbitration Proceeding it cannot be stated that plaintiffs have committed breach of the said contract and thus, I answer issue no.7 in negative.

38. In so far as issue no.8 is concerned, I also answer the same in negative. I am of the view that the plaintiffs were justified in the facts and circumstances of the case to make payment because the recovery proceedings were threatened against the plaintiffs in respect of the said award and the award was already made a decree of the court by the Chancellor Division in accordance with law. The plaintiffs were bound and liable to comply with the said decree and therefore plaintiffs have made payment rightly and thus I answer issue no.8 in negative.

39. In so far as issue no.9 is concerned, for the reasons and evidence discussed above, I answer the issue no.9 also in negative.

40. In so far issue no.10 is concerned, I answer the same in positive and also hold that the

defendants are liable to make payment of Rs.75000 as claimed by the plaintiffs.

41. In so far as issue no.11 is concerned it pertains to issue of limitation. The learned counsel for the plaintiffs has contended that suit is barred by law of limitation because delivery was to be effected under the contract in March 1969 and in any event within the extended period i.e. by May 1969. It is his case that the cause of action in respect of non-delivery of the goods arose latest in May 1969 and therefore suit should have been filed within the period of 3 years from the said date. Alternatively, it has been contended that in any event suit should have been filed within 3 years from the date of award i.e.3.11.69. Suit is filed on 27.1.77 and thus, suit is barred by law of limitation. In my opinion, there is no substance in the aforesaid contention. The cause of action to recover the dues by the plaintiffs arose only when the plaintiffs made the payments of the said amount which was awarded against them. There is no dispute in the present case that payments are made on 24.1.74 and 25.1.74 by the

plaintiffs to the solicitors of the foreign buyer and thus the suit for recovery of the said payment is filed on 21.1.77 that is within the period of limitation. Suit is within time. Thus, issue no.11 also I answer in negative.

42. In so far as issue no.12 is concerned whether, the suit is barred under Order 2 Rule 2 of the C.P.C. The entire contention of learned counsel for the defendants thereon is based on a total misconception of the provisions of Order 2 Rule 2 of the C.P.C.The said provisions reads as under:

> "2. Suit to include the whole claim:
>
> (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but the plaintiff may relinquish any portion of his claim in order to bring the suit within the Jurisdiction of any court.
>
> (2) Relinquish of part of claim - Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> (3) Omission to sue for one of several reliefs - A person entitled to more than one relief in respect of the same cause of

> action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.
>
> Explanation - For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

43. Order Rule 2 of the CPC applies only when suit for various reliefs on the same cause of action is sought to be filed by omitting to sue for a particular relief. It is for this relief which is sought to be omitted needs a leave under Order 2 Rule 2 for claiming the same in future. In the present case, the contention of the defendants is based on a case that in respect of various other commodities under the said contract, the plaintiffs had raised a dispute that for non performance thereof. The claim was referred to Arbitration of Mr.J.I.Mehta who rejected the claim as well as counter claim of both the parties. Thus it is contended that the suit for the present cause of action should have also been raised at that time

and having failed to claim the relief, the present suit is barred under Order 2 Rule 2 of the Civil Procedure Code.

44. The entire argument is based on misconception. In my opinion, the provision of Order 2 Rule 2 of the Civil Procedure Code do not apply where there are different cause of action under the same contract. Once there are different causes of actions, the claim can be filed as and when right to sue accrues. In the present case, the cause of action is to recover the damages suffered in respect of one particular contract. Admittedly this contract with the foreign supplier dt.31.5.69 was not a part of any such reference and the dispute herein pertains to settle different kind of disputes which also do not form part of earlier cause of action for which suit was filed and ultimately the same was referred to Arbitration. In the light of the fact that cause of action being totally different, provisions of Order 2 Rule 2 of the Civil Procedure Code do not apply in the present case. Thus I answer issue no.12 also in negative.

45. In so far as issue no.13 is concerned, I am of the opinion that plaintiffs having established their claim, the plaintiffs are entitled to decree. Accordingly, I decree the suit as prayed and direct further payment of interest from the date of Judgment till payment and or realisation at @ 12% p.a. I am also of the opinion that in the facts and circumstances of the case, the defendants should be saddled with cost of the present litigation and accordingly, I direct that the defendant to pay cost quantified at Rs.20000. Suit decreed accordingly.